No. 13,840

IN THE

United States Court of Appeals

For the Ninth Circuit

CAPITOL CHEVROLET COMPANY,
a corporation,

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,

Appellee.

JAMES A. KENYON, ADAMS SERVICE CO.,
a corporation, F. NORMAN PHELPS
and ALICE PHELPS,

Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,

Appellee.

PETITION FOR REHEARING OR FOR A HEARING EN BANC.

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PETITION FOR REHEARING OR FOR A HEARING EN BANC.

To the Honorable William Healy, The Honorable Walter L. Pope and The Honorable Richard H. Chambers, Circuit Judges:

The appellants Capitol Chevrolet Company, James A. Kenyon, Adams Service Co., F. Norman Phelps and

Alice Phelps respectfully petition this Honorable Court for a rehearing of the appeal in the above-entitled cause or for a hearing *en banc* and in support of this petition represent to the Court as follows:

Appellants each reserve their argued positions as to each of the points of appeal, but in this petition address themselves to those features of the decision wherein they believe the Court may be convinced its result is based upon its application of incorrect legal principles which were not discussed in the briefs already presented to the Court.

Therefore, this petition is devoted to convincing this Court that it has erred in three respects:

1. The opinion of the Court is in error in that it fails to recognize that Lawrence Warehouse Company (hereinafter referred to as "Lawrence"), as a warehouseman, owed Defense Supplies Corporation the contractual and statutory duty of watching the tires stored in the Ice Palace.

2. The opinion of the Court is in error in that it fails to recognize that Lawrence's duty as a warehouseman to watch the tires in the Ice Palace was nondelegable and that this proposition is the law of the case.

3. The opinion of the Court is in error in holding that Defense Supplies Corporation's approval or consent to the selection of the Burns Agency relieved Lawrence of its duty to watch the tires in the Ice Palace.

POINT ONE.

THE OPINION OF THE COURT IS IN ERROR IN THAT IT FAILS TO RECOGNIZE THAT LAWRENCE WAREHOUSE COMPANY, AS A WAREHOUSEMAN, OWED DEFENSE SUPPLIES CORPORATION THE CONTRACTUAL AND STATUTORY DUTY OF WATCHING THE TIRES STORED IN THE ICE PALACE.

The opinion of the Court states (pp. 6-7):

> "If Lawrence without further qualifications had contracted with Defense Supplies to provide a 24-hour watch, it would appear that the case would fall within this exception, and that Lawrence would have been responsible to Defense Supplies for the negligence of Burns or its employee. But the contract between Lawrence and Defense Supplies did not require Lawrence to provide guards. The arrangement with the Burns Agency was made at the express request of Defense Supplies, for the latter's benefit and at its expense."

Appellants submit that the foregoing statements in the Court's opinion are in error in that under California statutes and the contract between Lawrence and Defense Supplies Corporation (hereinafter referred to as "Defense Supplies"), Lawrence was required to provide guards. There is a written contract between Defense Supplies and Lawrence dated March 1, 1943, which refers specifically in paragraph 1 to the storage of tires and tubes in the Ice Palace (Ex. 1, R. 310, *et seq.* in 11418). The contract provides in paragraph 5 that Lawrence is to be compensated for the storage of the tires. Paragraph 11 of the contract provides as follows (R. 313-314 in 11418):

> "11. Neither you nor Defense Supplies Corporation will be liable for failure to perform under this

agreement due to causes beyond the control and without the fault or negligence of the defaulting party, including, but not restricted to, acts of God or of the public enemy, acts or orders of the Government, floods, fires, strikes, freight embargoes and unavailability, or delays in the delivery of any material in the care for or servicing of tires or tubes stored or delivered hereunder. Your general responsibility for the care and protection of the tires will be limited to such care as is required by laws governing warehouses in your state and to the exercise of ordinary care on your part."

This contract between Lawrence and Defense Supplies refers to Lawrence's duties in regard to the tires and tubes stored in the Ice Palace, makes no mention of the Burns Agency and expressly incorporates the applicable statutes of the State of California. Even without an express provision, the parties would be held to have assumed the rights and duties prescribed by the California statutes unless they contracted to the contrary.

George v. Bekins Van & Storage Co., 33 C.2d 834, 848, 205 P.2d 1037 (1949).

The statutes applicable to the relationship between Lawrence and Defense Supplies are the following sections of the Civil Code:

Section 1852:

"*Degree of care required of depositary for hire.* A depositary for hire must use at least ordinary care for the preservation of the thing deposited."

Section 1858e:

"*Liability for loss by fire.* No warehouseman or other person doing a general storage business is

responsible for any loss or damage to property by fire while in his custody, if he exercises reasonable care and diligence for its protection and preservation."

*Section 1858.30:**

"[*Injury to goods.*] A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

There are many cases under these and similar statutes holding that evidence of failure to guard or watch inflammable goods in a warehouse is sufficient to show a breach of the statutory duty of a warehouseman.

Hanson v. Wells Van & Storage Co., 100 C.A.2d 332, 335, 223 P.2d 509 (1950) (petition for hearing by Supreme Court denied);

Hammond v. United States, 173 F.2d 860, 863 (6th Cir. 1949);

Price & Pierce v. Jarka Great Lakes Corporation, 37 F.Supp. 939, 943 (W.D. Mich. 1941);

Mexia Compress Co. v. Speight, 142 S.W.2d 439, 440 (Tex. Civ. App. 1940);

Alabam's Freight Co. v. Jiminez, 40 Ariz. 18, 9 P. 2d 194, 196 (1932).

In view of the foregoing statutes and cases and the written contract of the parties, it is thus clear that

*Formerly Act 9059, Sec. 21, Deering's General Laws.

Lawrence's duty was not to hire a specific agency to watch the tires as the opinion of the Court holds, but to see to it that the tires were watched in a careful manner. The record affirms this conclusion (R. 284-286 in 11418; R. 366-367 in 13840).

POINT TWO.

THE OPINION OF THE COURT IS IN ERROR IN THAT IT FAILS TO RECOGNIZE THAT LAWRENCE'S DUTY AS A WAREHOUSEMAN TO WATCH THE TIRES IN THE ICE PALACE WAS NONDELEGABLE AND THAT THIS PROPOSITION IS THE LAW OF THE CASE.

The opinion of the Court assumes that the Burns Agency was an independent contractor and not, as Capitol, an agent of Lawrence. There are no findings to support this assumption. On the contrary, Finding XIII assumes that the watchmen were the agents of Lawrence but finds that they were not negligent; it states (R. 125 in 13840):

> "That it is not true that said damages or any thereof, were proximately caused or contributed to by any negligence or failure of said cross-claimant or its agents, guards, or watchmen to exercise ordinary care, caution or prudence to avoid said fire, other than by the failure of said cross-claimant's agent, Capitol Chevrolet Company, so to do."

The opinion of the Court concedes that Kissel, the watchman, was negligent. Lawrence's allegations in its answer are as follows (R. 41 in 11418):

> "* * * plaintiff directed that this defendant employ watchmen for the said premises and for the tires and tubes therein stored, and accordingly, this defendant *employed and regularly maintained* on said premises day and night watchmen of the agency selected and paid for by the said plaintiff." (Emphasis added.)

It has been held in a similar situation that one who was hired by a railroad having the duties of a warehouseman to perform its duties was an agent as a matter of law and not an independent contractor.

> *Wichita Valley Ry. Co. v. Golden,* 211 S.W. 465 (Tex.Civ.App. 1919).

Assuming, however, that the Burns Agency was an independent contractor, the duty of Lawrence to watch the tires in the warehouse was nondelegable to the Burns Agency. In the Court's opinion it is stated (p. 6):

> "An exhaustive examination of California statutes and American cases generally discloses that warehousemen do not have non-delegable duties apart from their contractual obligations."

As previously pointed out herein, Lawrence did have an express contractual duty to Defense Supplies to do that which the Burns Agency did negligently. Further, even if there had been only a bailment for hire to Lawrence and no contract with Defense Supplies, Lawrence would have been under a statutory duty to preserve the subject of the bailment by providing guards. The opinion of the Court recognizes that neither contractual nor statutory duties are delegable.

It is well established in the law that a warehouseman is a bailee for hire and that the relationship between the depositor and the warehouseman is that of bailor-bailee.

L. A. Warehouse Co. v. American Etc. Co., 22 C.2d 402, 139 P.2d 641 (1943), cert. denied, 320 U.S. 790;

Atmore Truckers Ass'n v. Westchester Fire Ins. Co., 218 F.2d 461 (5th Cir. 1955);

Aircraft Sales & Service v. Bramlett, 254 Ala. 588, 49 So. 2d 144, 148 (1950).

This Court has held in an opinion by Circuit Judge Healy that delivery of goods to a warehouseman creates a bailment.

Heffron v. Bank of America Nat. Trust & Savings Ass'n, 113 F.2d 239 (9th Cir. 1940).

It is equally well established in the law that a bailee for hire cannot escape direct responsibility to its bailor by entrusting all or part of his duties as bailee to an independent contractor.

The Comet, 66 F.Supp. 231 (E.D.Pa. 1946).

> ("Here there was a bailment for hire and the rule is well settled that a bailee for hire is responsible for the proper care, not only by himself, but by any one to whom he entrusts it and it makes no difference whether that other is an independent contractor or not" [citing cases].)
>
> *Aircraft Sales & Service v. Bramlett,* 254 Ala. 588, 49 So. 2d 144, 149 (1950).

> ("The defendant [warehouseman or storage bailee] could not absolve itself of its duty in the premises

because it did not own the hanger or because the government furnished the fire-fighting equipment and made periodic fire inspections.'')

Huckins Hotel Co. v. Clampitt, 101 Okla. 190, 224 Pac. 945 (1924). (Innkeeper-bailee held to have nondelegable duty to care for guest's property.)

The cases cited in the opinion of the Court—three involving the liability of undertakers in furnishing vehicles and one involving a building wrecker—do not detract from the holdings of the foregoing cases because they do not involve bailees for hire.

The only case counsel have been able to find in which a warehouseman or bailee has been able to exculpate himself from liability for the negligence of an independent contractor is *Brunswick Grocery Co. v. Brunswick & W.R. Co.,* 106 Ga. 270, 32 S.E. 92 (1898). But in that case the warehouseman, a railroad, had not delegated its duties as a warehouseman to the independent contractor; the contractor was merely engaged in repairing a wharf owned by the railroad. If the negligent contractor in the *Brunswick* case had been engaged in caring for the plaintiff's goods, it is only reasonable to suppose that the decision in the *Brunswick* case would have been different. In any event the holding of the *Brunswick* case has been criticized as not in line with the authorities.

Annotation, 29 A.L.R. 736 at 813, *et seq.* (1924).

Finally, the District Court has already held that Lawrence's duties were *legal* and *contractual* and could not be delegated either to Capitol or to the Burns Agency. In *Defense Supplies Corp. v. Lawrence Ware-*

house Co., 67 F. Supp. 16 (N.D. Cal. 1946), Judge Goodman stated (pp. 21-22):

> "It is contended that Lawrence Warehouse Company stands acquitted of liability because the plaintiff inspected and approved the use of the premises as a warehouse, approved the agency contract with Capitol Chevrolet Company, designated the persons, including Henry, to be allowed access to the premises and selected and employed an independent detective agency to provide a 24 hour armed guard service. But by none of the foregoing acts was Lawrence Warehouse Company absolved of its legal and contractual obligation as warehouseman to protect plaintiff's property from risk of loss by fire. Nor was Lawrence Warehouse Company relieved of its duty by plaintiff's approval or selection of Capitol Chevrolet Company as agent of Lawrence Warehouse Company for the latter was under no compulsion to contract as it did with plaintiff. Having done so, it is bound thereby."

It is inconceivable that Lawrence would have been absolved of all liability to Defense Supplies if Capitol had been an independent contractor instead of an agent.

POINT THREE.

THE OPINION OF THE COURT IS IN ERROR IN HOLDING THAT DEFENSE SUPPLIES CORPORATION'S APPROVAL OR CONSENT TO THE SELECTION OF THE BURNS AGENCY RELIEVED LAWRENCE OF ITS DUTY TO WATCH THE TIRES IN THE ICE PALACE.

The opinion of the Court states (p. 7):

> "It is essential to bear in mind that Defense Supplies not only had full knowledge of the hiring of Burns to perform the desired guard service, but requested, acquiesced in, and approved of the arrangement. The exception is not applied in such circumstances. * * * Thus the facts absolve Lawrence of responsibility for negligence on the part of Burns or its agents, inasmuch as Lawrence did not delegate to Burns a duty it had itself contracted to perform."

The preceding discussion answers the assertion that the approval or acquiescence of Defense Supplies absolves Lawrence of the negligence of the Burns Agency because, as has been shown, Lawrence had a statutory and contractual duty which was broader than the mere hiring of the Burns Agency. There is no evidence that either Defense Supplies or Capitol consented or acquiesced in the negligence of the Burns Agency.

The observation in the Court's opinion is relevant, but only in a limited sense. Lawrence's liability for the acts of an independent contractor performing its duties could be based on either of two theories: First, negligence in the selection of the Burns Agency, if that were the case, or second, negligent performance by the Burns Agency of a nondelegable duty of Lawrence. Thus in speaking of the liability for the acts of independent contractors,

the *Restatement of Torts* uses the phrase, "Harm caused by negligence of a carefully selected independent contractor" (Vol. 2, p. 1127). The approval by Defense Supplies of the Burns Detective Agency precluded Defense Supplies from asserting that Lawrence had negligently selected the independent contractor. It did not preclude Defense Supplies from asserting that the Burns Agency, though carefully selected, negligently performed a nondelegable duty of Lawrence.

A further difficulty with the Court's approach to the instant case, is that in rendering the judgment in favor of Defense Supplies the District Court specifically found that the negligence of Lawrence and Capitol was in their permitting the negligent use of the acetylene torch in the Ice Palace and in failing to maintain the premises (Finding V, R. 80-81 in 11418). But the Court expressly found that Defense Supplies consented to, approved and authorized the leasing of the Ice Palace (Finding IV-A, R. 80 in 11418). These findings clearly show that it was Capitol's function of providing a storage space which was approved and acquiesced in and that it was the failure to perform the watching function that caused the fire.

The District Court has already held in this case that no amount of approval would relieve Lawrence of its duties to Defense Supplies (R. 72 in 11418). It is thus the law of this case that Lawrence could not be relieved of the statutory and contractual duties of a warehouseman by approval or acquiescence.

A realistic and determinative answer to the problem is also found if it is viewed from the standpoint of the

relationship between Capitol and Lawrence. It was the duty of Lawrence under California law and under its contract with Defense Supplies to watch the tires and it was also the statutory duty of Capitol, as custodian, to watch the tires. As between Lawrence and Capitol, Lawrence undertook to discharge the watching function and "employed the Burns Detective Agency and paid them" (R. 284-286 in 11418). Capitol knew that Lawrence placed guards at the Ice Palace (R. 193 in 11418), although there is no evidence that Capitol approved or consented to Lawrence's selection of the Burns Agency. Thus even if Lawrence undertook the watching function gratuitously, it owed the duty to Capitol to see that this function was carefully performed.

Higgins Lumber Co. v. Rosamond, 217 Miss. 1, 63 So. 2d 408, 410 (1953);

Restatement, *Agency,* Sec. 378;

Boyer, *Promissory Estoppel,* 50 Mich. L. Rev. 873, 874 (1952).

Specifically, this means that Capitol could rely on Lawrence to see to it that the tires and tubes would not be exposed to unreasonable risks by the acts of intruders. If this had not been the case, Capitol would have had to undertake the responsibility for the watching function itself in order to discharge its duties to Defense Supplies and would have had to take steps to prevent McGrew from negligently using his acetylene torch on the premises or be liable for the consequences. Its failure in the instant case to do so was occasioned only by its reliance on Lawrence's undertaking to perform the watching function. The fact that Lawrence

passed the watching function on to an independent contractor not connected with or approved by Capitol in no way lessened Capitol's reliance on Lawrence.

It is manifestly unfair to require Capitol to compensate Lawrence for the loss caused by the negligent performance of a duty which Lawrence undertook to perform.

CONCLUSION.

It cannot be doubted that the primary cause of the fire which destroyed the Ice Palace was the negligent use of an acetylene torch by McGrew and that next to McGrew the negligence of Kissel, the watchman, was the efficient cause of the fire. Furthermore, it cannot be doubted that Lawrence, as among Lawrence, Capitol and Defense Supplies, undertook the watching function. This petition has been filed to demonstrate that under the applicable statutes and case law and the law of this case, Lawrence had a statutory and contractual duty to watch the tires and that it could not absolve itself from liability for the negligent performance of this duty by delegating it to a carefully selected independent contractor. These subjects were not discussed in the briefs previously filed with this Court. It is important not only in the instant case but for establishing the liabilities and duties of warehousemen generally that this Court recognize these rules of law. The principle of the law of the case being fundamental in appellate procedure, a rehearing or a hearing *en banc* should be granted before a departure is made from this principle. The precise holding of the District Court calling for the application of this principle

was not pointed out in the briefs previously filed with this Court.

For the foregoing reasons appellants, petitioners herein, submit that this Court should grant a rehearing or, in the alternative, a hearing *en banc* of their appeals.

Dated, San Francisco, California,
November 29, 1955.

Respectfully submitted,
HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, FOERSTER, HOLLOWAY,
SHUMAN & CLARK,
DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellants Capitol Chevrolet Company, James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing Petition for Rehearing or for a Hearing *en banc* is well founded and that it is not interposed for delay.

HERBERT W. CLARK.

Dated, San Francisco, California,
November 29, 1955.